

Splitting the

BY PAUL CHARLTON & STEPHEN RICHER

Arizona Deserves a Fair Deal Split the Ninth Circuit

In a federal courtroom in the early 1990s, a new assistant U.S. attorney prosecuted an elderly Navajo male charged with attempted homicide for having cut his wife's throat from ear to ear using a pair of sheep sheers. The defendant was convicted of the charge, and on the day of sentencing, the defendant, who spoke not a word of English, used a Navajo translator to assist him. As part of the colloquy for the district judge handling the sentencing, the judge asked the defendant: do you have any questions for the prosecutor? There followed five minutes of dialog between the translator and defendant before the defendant finally looked, with recognition, at the prosecutor, spoke with the translator, and the translator responded to the judge: no, I have no questions.

As the translator left the courtroom, the assistant U.S. attorney stopped her and asked why such a seemingly simple question had taken five minutes to answer. It was, said the translator, because the Navajo have no word for "prosecutor," and the concept of prosecution by the government was unknown to this elderly Navajo. Instead, the translator had to reach back to a more familiar concept for the defendant: The Navajo Long Walk to Fort Sumner, a murderous and deadly affair led by Kit Carson in which hundreds of Navajos died as they were forcibly removed from Navajo lands. "I asked the defendant," said the translator, "if he had any questions of the man from Fort Sumner. And then he knew who you were."

By geography and jurisdiction, we know that story, tied to a tragic history, will never repeat itself in any other state or federal courthouse, save one in Arizona. Were there an appeal of that case, even today, it is unlikely that the defendant would have drawn a Ninth Circuit judge who would have had any concept of the defendant's cultural reality.

A desire to have a bench that knows us and our culture, a culture

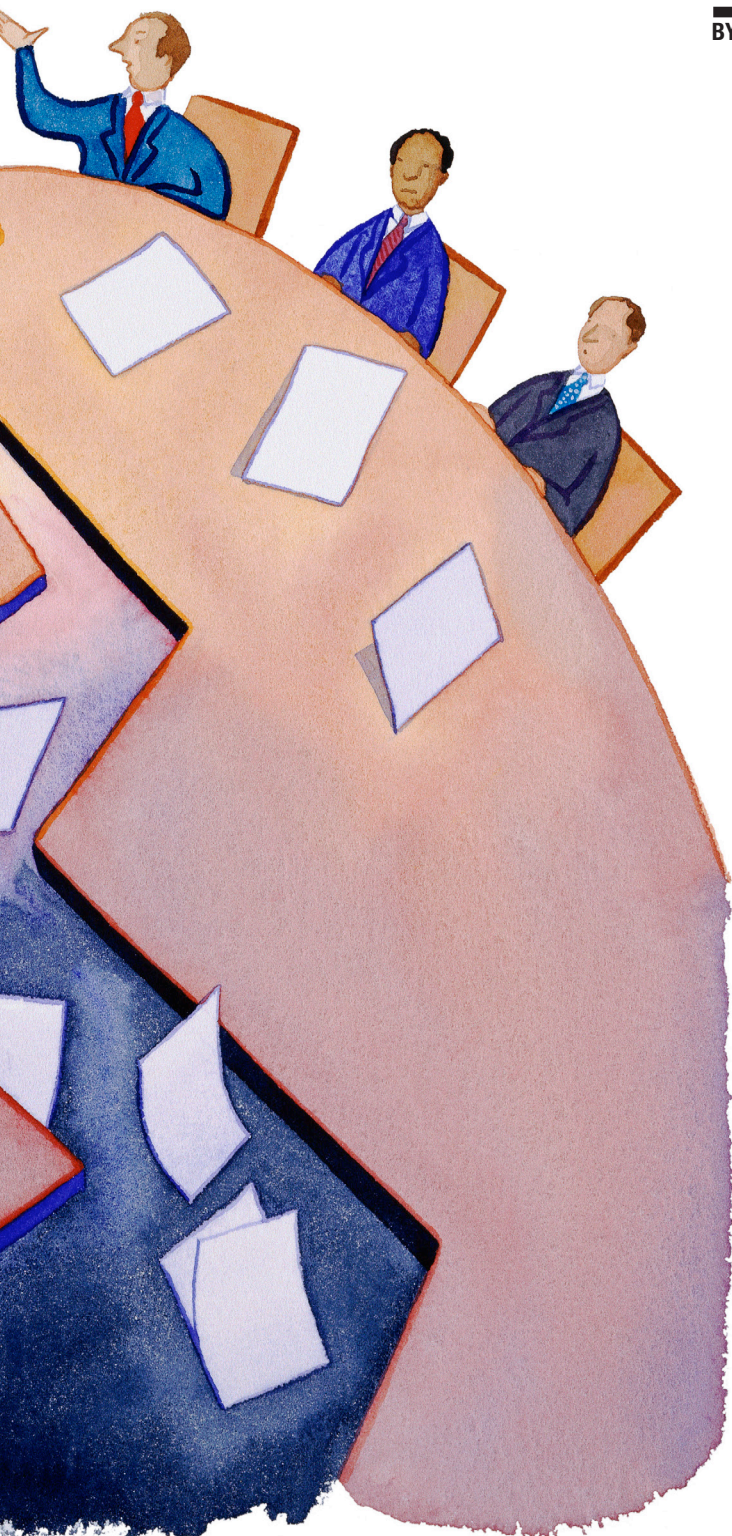
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PAUL CHARLTON is a partner at Steptoe & Johnson LLP. He was a career state and federal prosecutor, appeared often before the Ninth Circuit, and served as the former U.S. Attorney for the District of Arizona. **STEPHEN RICHER** is an associate at Steptoe & Johnson LLP. He previously worked as a Washington, D.C., think tank analyst, a journalist, and an entrepreneur.



Ninth Circuit

BY PATRICIA LEE REFO



Retain the Ninth!

Splitting the Ninth Circuit is a solution in search of a problem. There is nothing wrong with the Ninth Circuit. Carving it up would be a staggeringly expensive and disruptive exercise that would do absolutely nothing to improve the delivery of justice—to anyone.

At the most recent congressional hearings on the issue, every Ninth Circuit judge who testified in person opposed splitting the circuit. Each laid out in detail why splitting the circuit was both unwarranted and, frankly, just a really bad idea. Every Chief Judge of the Ninth Circuit for decades has opposed a split—and who would know better? The American Bar Association opposes a split. The Federal Bar Association opposes a split. Not a single state bar within the circuit is advocating for a split. Aside from politicians with a partisan agenda, there is no constituency supporting a split.

The Ninth Circuit is a large but efficient, effective circuit that leads the nation in using technology and case management tools to increase productivity and save taxpayer dollars. It leverages its size to serve our citizens and advance justice. It is neither a black hole of litigation delay nor a renegade court that relentlessly colors outside the lines. Moreover, the proposed new circuits would each create a whole new set of problems—which explains why the proponents of splitting the Ninth Circuit hold widely different views about what the new “split” circuits should look like. Finally, splitting the Ninth Circuit would be bad for the citizens of Arizona and for the administration of justice in our state.

We Have Seen This Movie Before

The notion of splitting the Ninth Circuit has been floating around for decades. “Like the emergence of cicadas from the soil,” proposals

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PATRICIA LEE REFO is a partner at Snell & Wilmer LLP in Phoenix. She is a former Chair of the House of Delegates of the American Bar Association, and a former Chair of the ABA Section of Litigation.

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unique to Arizona and its people, compels us to support a split in the Ninth Circuit.

Americans have long bristled at being ruled from afar by somebody else. We didn't take well to being a British

colony; we consistently roll our eyes at the United Nations and only reluctantly cede even nominal power to it; we were warned by multiple founding fathers about “entangling alliances” that might bind our hands; and state governors and legislators—from both parties—often object to the alleged meddling of Washington D.C.

Arizona is no outlier in this penchant for self-rule. We delayed entry into the United States because we didn't want to be lumped together as one state with the then-more populous New Mexico; we flagrantly ignored the wishes of President Taft by allowing for the recall of state judges; we frequently pass legislation that—whether wise or foolish—causes national controversy; and we're home to a “damn the torpedoes” mentality that sometimes earns our state congressmen a reputation as “mavericks.”

Given this streak of independence, it's no surprise that many Arizonans—Governor Ducey¹, Senator Flake², Senator McCain³, and former U.S. Supreme Court Justice O'Connor⁴ included—want to free Arizona from the federal judicial Ninth Circuit. Law professor Jonathan Adler characterized this effort as such: “Arizona does not want to be under the thumb of a court that is dominated by California judges.”⁵ We, the authors of this article, certainly agree that Arizona shouldn't be under anyone's thumb, and therefore we support the split of the Ninth Circuit. Our reasoning, however, is a bit different than that of many national pundits. For example, while we acknowledge that the Ninth Circuit is more liberal than Arizona's population (18 of the currently sitting 25 judges were named by Democratic presidents⁶), we don't view the court's politics as a reason for restructuring the circuit. Justice Kennedy said that, “you don't design a circuit around the perceived political leanings of the judges.”⁷ We agree. We also believe

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that though the Ninth Circuit is one of the most (and in many years, the most⁸) overturned circuits—occasionally producing real eyebrow-raising decisions—these Supreme Court reversal statistics are of limited mathematical significance and belie the fact that the Ninth Circuit is largely comprised of intelligent, capable, reasonable, precedent-following judges.

We instead base our pro-split belief on two principles: *representation* and *justice*. Specifically, we argue as to representation that: (1) Arizona is not adequately represented at the circuit court level, and (2) because Arizona is not adequately represented, unique features of Arizona's population and geography are underappreciated and understudied at the Ninth Circuit, and our Arizona outlook on matters is often unheard. We then, in section 3, turn to the justice component by arguing that the Ninth Circuit's size and growth rate threaten the speedy and fair prosecution of the law. After presenting our arguments in favor of splitting the circuit, we address, in section 4, some of the favorite arguments of opponents of the split.

1. Arizona is not adequately represented at the circuit court level

Readers of *Arizona Attorney* know the importance of the Ninth Circuit: it has appellate jurisdiction over all cases arising from the federal courts in Arizona, Alaska, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington. This of course means that if an Arizonan brings a claim rooted in federal law, or with diverse parties, and doesn't like the Arizona federal district court's ruling, that Arizonan has to put his or her faith in the Ninth Circuit. The Ninth Circuit is significant for both Arizona lives

and law.

The Ninth Circuit is composed of 29, non-senior judges. Of these 29 judges, tradition dictates that three sit in Arizona. Currently, two of those judges are Mary Murguia (ap-

pointed by President Obama in 2011) and Andrew Hurwitz (appointed by President Obama in 2012). The third judge will be named by President Trump in the coming months to replace Judge Barry Silverman, who recently went on senior status.

This means that of the 29 judges, only three judges—roughly 10 percent of the circuit—call Arizona home, appreciate Arizona's nuances, have the blessing of Arizona's two senators (through the senatorial courtesy process), know about Arizona's unique landscape, and understand Arizona's distinct history. This is inconsistent with Arizona's population: 6.93 million people, 14th biggest in the country, and one of the ten fastest growing states.

In order to compare apples to apples, we calculated Arizona's percent representation in its circuit court (three out of 29, 10.3%) with its percentage of the country's population (2.1%). This yields a ratio of approximately 4.8 to 1—that is 4.8 percentage points of representation within a circuit court for every one percent of the country's population. This is third lowest (worst represented) ratio of all states. Compare Arizona with, for example, Louisiana. Louisiana has approximately 4.68 million people, yet it has five of the 17 judges in the Fifth Circuit. Or compare Arizona with Connecticut. Like Arizona, Connecticut is home to three circuit court judges. But the Second Circuit in which Connecticut resides only has 13 authorized judges, and Connecticut has only 3.57 million people—roughly half Arizona's population.⁹

The situation is exacerbated by the Ninth Circuit's unique approach to en banc review. Other circuits gather all sitting judges for review. If a state has at least one sitting circuit judge (like Maine), then that state will have a seat at the en banc review table. The Ninth Circuit, however, is too

big to convene all 29 judges, so en banc review ordinarily consists of 11 judges—the chief judge plus 10 randomly selected judges.¹⁰ This means that an en banc review of an important Ninth Circuit case, which may significantly affect Arizona, might very well have no judges from the state of Arizona.

This problem, while acute in Arizona, is not unique to Arizona. Washington, a fellow Ninth Circuit state, has about 7.2 million residents, but only hosts two of the Ninth Circuit’s 29 judges. This is a general Ninth Circuit problem. It is simply impossible for states in the Ninth Circuit to get the type of percentage representation afforded to states in other circuits because the Ninth Circuit is so big. It’s too big to offer Arizona the recognition and related judicial autonomy that our populous and fast-growing state deserves.

2. Being underrepresented matters

Some people might question why we care that Arizona is poorly represented at the federal circuit court level. After all, the law is

the law, and if judges simply apply the law, it shouldn’t matter whether the judge is from Arizona, California, Oregon, or Guam. But anyone who follows the circuit courts or the Supreme Court knows that the business of judging is not always straightforward and that a judge’s background can influence how he or she interprets the law. Supreme Court Justice Sonia Sotomayor famously stated in 2001 that, “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”¹¹ Though the remark caused a great deal of controversy, few people challenged Sotomayor’s underlying point that a judge’s background (gender, ethnicity, or, in this case, location) can influence the judge’s perspective.

In fact, the *opponents* of splitting the Ninth Circuit are the first to acknowledge that judges from different states have different perspectives. Judge Alex Kozinski of the Ninth Circuit, an opponent of splitting the Ninth, stated that, “It’s good to have the perspective of judges who don’t

all come from the same region.”¹² Similarly, Ben Feuer, chairman of the California Appellate Law Group, also an opponent of splitting the Ninth Circuit, wrote in *The Los Angeles Times*, “[t]he circuit’s geographic spread means a case arising out of California might be heard by judges from Idaho, Hawaii or Washington, allowing for a great variety of perspectives to inform the court’s judgment.”¹³

If being from Arizona influences the way one sees the law, then we of course want more Arizona-based judges contributing to the creation of Arizona law that affects Arizona lives. Additionally, there are certain topics, like the story in our introduction, that are of particular importance to Arizonans that are likely to be better understood by Arizona judges than judges in California (which typically houses 16 of the 29 Ninth Circuit judges). For instance, American Indians account for approximately 5.3% of Arizona’s population,¹⁴ and there are 21 different tribes in the state.¹⁵ Legal questions concerning those tribes and their lands present unique legal questions. Given the

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importance of American Indians in Arizona, it's not surprising that the country's first female American Indian federal judge, Diane Humetewa, is a judge for the federal district of Arizona.¹⁶ Conversely, though California is home to a large American Indian population, California is a Public Law 280 state, meaning that the federal government has ceded criminal jurisdiction for crimes committed on reservations located in California to the state.¹⁷ By contrast, the federal government retains jurisdiction for most felony criminal acts committed on tribal lands in Arizona. Every appeal from a felony conviction arising out of an offense occurring on a reservation located in Arizona will wind up in the Ninth Circuit. Other unique features

of Arizona include our perspective on water use, our perspective on governmentally controlled lands (federal, state, and tribe-controlled land makes up 82% of Arizona¹⁸), and our long, progressive state constitution.¹⁹

Being underrepresented at the Ninth Circuit also matters in non-quantifiable ways. California-based judges dominate the Ninth Circuit and often determine federal law for the entire western United States. But Californians sometimes see things differently than Arizonans. Based on 10 years as Assistant U.S. Attorney for Arizona and six years as U.S. Attorney for Arizona, and having litigated many cases in both Arizona and California, we can tell you that that Arizona judges see criminal justice issues (and the

federal prosecutors who convey those issues) in a very different way than do California judges. For example, Judge Kozinski—formerly Chief Judge of the Ninth Circuit—is openly hostile to federal prosecutors. In a 2015 article for Georgetown Law Journal, Judge Kozinski suggested that the average federal prosecutor doesn't "play fair," but instead is unjust and motivated by an "attitude of God-like omniscience."²⁰ The ethics of federal prosecutors can be debated elsewhere, but based on our considerable experience in this field, we know that Judge Kozinski's views are a far cry from the views of the median Arizona judge. It's likely not the only area where a significant difference exists. Because of this difference, it's important that the views of Arizona judges not be completely drowned out by Californians.

3. The Ninth Circuit size causes injustice

The Ninth Circuit is huge. It has jurisdiction over 61 million people, 11 states/territories, and roughly 11,500 cases per year.²¹

The next biggest in each of these categories are: 33 million people (the Eleventh Circuit), six states (the Eighth and the Tenth Circuits), and 7,843 cases (Eleventh).²² This grossly disproportionate size seems per se peculiar, but the size becomes problematic when it affects the circuit's ability to effect justice. Former Chief Judge of

the Ninth Circuit J. Clifford Wallace wrote in 1995—while arguing that the Ninth Circuit was not too big—that “What are the objective indicia that demonstrate that a circuit is operating well or poorly? Three in particular come to mind: case processing times, case termination, and consistency of decisions.”²³ Using two components of Judge Wallace’s own criteria yields the conclusion that the Ninth Circuit is too big to operate well.

Judged by case processing times, the Ninth Circuit lags behind its peer circuits. *The Los Angeles times* reported in October, 2011, that it takes the Ninth Circuit “16.3 months for the court’s panels to issue opinions after an appeal is filed, compared with 11.7 months on average for all circuits.”²⁴ Arizona Governor Doug Ducey and Senator Jeff Flake recently stated that the Ninth Circuit takes 15 months on average,²⁵ and the Ninth Circuit itself, on its website, estimates 12-20 months from the notice of the appeal date for a civil appeal.²⁶ As Senator Flake recently noted, “[t]he one bedrock principle we have in this country is the swift access to justice. If you live in the 9th Circuit, particularly Arizona, you don’t have that.”²⁷

Consistency of decisions in the Ninth Circuit also suffers from the circuit’s size. Though it is difficult to quantify, many commentators have pointed to the Ninth Circuit’s comparatively poor performance in front of the Supreme Court as evidence that the circuit’s decisions are inconsistent. As we noted earlier in this article, however, we’ve resisted citing to Supreme Court reversal statistics because they are limited in number and hand-picked by the Court. But though we resist quantitative denunciation of the Ninth Circuit’s consistency, many commentators with a deep knowledge of

Many commentators have offered qualitative criticisms of the Ninth Circuit as inconsistent in its opinions as a result of its size.

the Ninth Circuit have offered qualitative criticisms of the Ninth Circuit as inconsistent in its opinions as a result of its size. Consider the following:

- Former Supreme Court Justice John Paul Stevens stated in 1999 that the Ninth Circuit was “so large that even the most conscientious judge probably cannot keep abreast of her own court’s output.”²⁸
- Justice Anthony Kennedy also stated at the same time that the Ninth Circuit’s large size was a hindrance to the achievement of consistency in the circuit’s case law.²⁹
- In 1998, the Commission on Structural Alternatives for the Federal Courts concluded that, assessed by consistency of opinions, “the maximum number of judges for an effective appellate court functioning as a single decisional unit is somewhere between eleven and seventeen.”³⁰
- Ninth Circuit Senior Judge Diarmuid O’Scannlain wrote in 1996, “Further, as the number of opinions increases, we judges risk losing the ability to keep track of precedents and the ability to know what our circuit’s law is.”³¹
- Analogously, Judge Gerald Bard Tjoflat wrote of the former Fifth Circuit before it was split: “when you get as large as the old Fifth Circuit was, with twenty-six judges, the law becomes extremely unstable. One of several thousand different panel combinations will decide the case, will interpret the law ... a court of twenty-six will produce irreconcilable statements of law.”³²

Both of these concerns—time-to-deci-

sion and inconsistency—will only get worse as the court continues to swell. Between 2010 and 2016, Nevada, Arizona, Washington, Idaho, Oregon, Montana and California were the sixth, sev-

enth, eighth, ninth, eleventh, sixteenth, and seventeenth fastest growing states in the country respectively. Judge O’Scannlain noted this problematic trend as far back as 1996: “in light of the demographic trends in our country, it is clear that the population of the states in the Ninth Circuit, and thus the caseload of the federal judiciary sitting in those states, will continue to increase at a rate significantly ahead of most other regions of the country.”³³ If the Ninth Circuit continues to grow, and Congress takes no action to split it, the decisions may very well take longer and the law may be less consistent—two factors that will adversely affect the justice Arizonans receive at the appellate level.

4. Arguments made for preserving the Ninth Circuit are unpersuasive

The Ninth Circuit is facially incongruent with the rest of the federal circuits. Nonetheless, it is not without its defenders. Many thoughtful and articulate judges, attorneys, politicians, and otherwise-court-followers have spoken out against the latest legislative efforts to split the Ninth Circuit. Some of these status quo defenders are motivated by their preference for the current political makeup of the circuit (as is true of advocates for splitting the circuit). But other defenders raise apolitical arguments that, while worth considering, remain inadequate grounds for preserving a Circuit that jeopardizes fairness and justice.

Status Quo Argument 1: If you simply split the circuit into two new circuits without adding new judges, nothing is improved.

Response to 1: New judges should be added. Maybe the two new circuits could both have 17 judges (equal to the Fifth Circuit) such that there would be five more judges than are currently in the Ninth Circuit. But even so, if no new judges are added, the situation is still improved by a split. Judges in the newly created, smaller circuits would have an easier time reading all of the circuit court's rulings; the new circuits would allow for greater collegiality because judges would more frequently sit on panels together (there are fewer combinations of three judge panels from a circuit of, say, 17 judges, than there are from a circuit of 29 judges); the new circuits could hold en banc reviews with all circuit judges present; states such as Arizona would host a higher percentage of judges in a smaller circuit; more states would host appellate arguments; and travel distances would likely be reduced if the geographic span of the two circuits is reduced from the Ninth Circuit's current territorial reach.

Status Quo Argument 2: Creating a new circuit would require a whole circuit-full of new, duplicative infrastructure. That would be costly.

Response to 2: We certainly don't support the unnecessary use of taxpayer funds, and we acknowledge that there would be costs involved in creating a new circuit. But cost cannot be the be-all-end-all. If it were, we would scrap the entire Arizona government in favor of being governed from Sacramento. After all, if we did that, we wouldn't need the duplicative infrastructure of our own state capitol building, and we might not need the buildings of Arizona State University because UCLA has ample facilities. Moreover, this line of reasoning suggests we should perhaps collapse all circuits into one circuit, such that the federal circuit would just be one building in Washington, D.C. right next to the United States Supreme Court. Though cost-efficient, such a system would deprive states of input and autonomy.

Status Quo Argument 3: Even if much of the infrastructure is already in place for a new circuit, there would be other costs such as additional security guards.

Response to 3: We think these costs are overblown. But even if they aren't, cost should be balanced with an increase in the quality of justice. Costs such as these are worth the expenditure. When the FBI for decades refused to record custodial interrogations, they pointed to the high costs of recording equipment as an excuse for maintaining the status quo of taking hand written notes when a defendant confessed. Similarly, for years, police agencies resisted employing body cameras on police officers. Now, however, most agencies acknowledge that the cost of these cameras is worthwhile as they can significantly reduce incidents of police misconduct. We see the cost argument against splitting the Ninth Circuit as one that will similarly fall by the wayside once the benefits of a split are fully realized.


Status Quo Argument 4: Dividing the Ninth Circuit into two circuits would create divisions in western law that would hamper economic interaction between the states.

Response to 4: Arizona currently has successful economic relationships with Utah and New Mexico (Tenth Circuit). There's no reason why it should be any different with a new circuit.

Status Quo Argument 5: Beware the law of unintended consequences when splitting the Ninth Circuit.

Response to 5: We take this argument very seriously as well, but when Arizona is under the thumb of other states, and when justice is jeopardized, we must risk the consequences of disrupting the status quo. Moreover, no great harm—indeed, the opposite—came from splitting the previously oversized Fifth Circuit in 1981.

Conclusion

Trish Refo, one of Arizona's finest attorneys, will likely offer additional, thoughtful reasons for preserving the Ninth Circuit as it is, and we look forward to reading her arguments. At the end of the day, however, there is no denying that the Ninth Circuit is at least double the size of every other circuit and that this unprecedented size both minimizes Arizona's voice and jeopardizes the pursuit of justice in our legal system. 

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